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NO. 95-53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

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QUESTION PRESENTED

Whether, under the Commerce Clause of the United States Constitution, the State of Louisiana may impose its use tax on natural gas used as compressor fuel in a purely interstate pipeline system, when the compressor fuel is tapped directly from the instrumentality of interstate commerce itself — i.e., the main pipeline which carries the commingled gas stream continuously and uninterruptedly on its interstate journey — and is consumed immediately in the compressor engines to push the remainder of the gas on its interstate journey.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Columbia Gulf Transmission Company ("Columbia Gulf") is a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Charleston, West Virginia. Pursuant to Rule 29.1 of the Rules of this Court, Columbia Gulf states that its parent corporation is the Columbia Gas System, Inc., also a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Wilmington, Delaware. Columbia Gulf has no subsidiaries, wholly owned or otherwise.

Respondent Ralph Slaughter, Secretary of the Department of Revenue and Taxation, State of Louisiana, is the duly appointed and currently serving Secretary of the Louisiana Department of Revenue and Taxation. He is the person who is charged by statute with administering Louisiana's use tax.

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No. 95-____

In The
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OCTOBER TERM, 1995

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PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Columbia Gulf Transmission Company respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Louisiana rendered in the above-entitled proceedings on April 10, 1995.

OPINIONS BELOW

The Opinion of the Supreme Court of Louisiana rendered on April 10, 1995 (App. A, *infra* at A-1) is reported at 653 So 2d 522.

The Opinion of the Louisiana Court of Appeal, First Circuit entered on May 20, 1994 (App. B, *infra* at A-9) is reported at 637 So. 2d 733.

The Judgment (App. C, *infra* at A-14) of Judge Bob Hester of the Nineteenth Judicial District Court, for East Baton Rouge Parish, Louisiana entered on April 27, 1993, is unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana (App. A, *infra*, A-1) was rendered on April 10, 1995. The jurisdiction of this Court in invoked under the provisions of 28 U.S.C. §1257(a) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional:

Article 1, §8, Cl. 3. Powers of Congress. The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Statutory:

The basic Louisiana sales tax and use tax provisions are set forth in La. R.S. 47:302 (App. D, *infra*, A-17).

STATEMENT OF THE CASE

Petitioner, Columbia Gulf Transmission Company ("Columbia Gulf") is in the sole business of transporting natural gas in interstate commerce. It has interstate transmission facilities (pipelines and compressor stations) offshore Louisiana in the Gulf of Mexico and in the states of Louisiana, Mississippi, Tennessee and Kentucky. Practically all of Columbia Gulf's activities with respect to its interstate transmission pipelines are subject to regulation and control by the Federal Energy Regulatory commission ("FERC") pursuant to the Natural Gas Act (15 U.S.C. §717, *et seq.*).

At issue in these proceedings is the constitutionality of the imposition of a use tax by the State of Louisiana on the value of natural gas which is withdrawn by Columbia Gulf directly from the gas stream being transmitted in its interstate transmission pipelines, and burned as compressor fuel for the sole purpose of pushing the remainder of the same gas stream on its interstate journey. The four compressor stations in Louisiana, located at Pecan Island, Rayne, Alexandria and Delhi, were constructed and are operated under the authority of Certificates of Public Convenience and Necessity issued by FERC (or its predecessor, the Federal Power Commission). These compressor stations are functionally identical, and are used exclusively to move natural gas through Columbia Gulf's interstate transmission pipelines.

Columbia Gulf properly paid the use tax under protest and sued for a refund, alleging specifically in its initial pleading that

the imposition of the tax "is an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3." Columbia Gulf's Petition, paragraph 5. In support of its motion for summary judgment in the trial court, Columbia Gulf submitted evidence — all of which was undisputed — establishing that its only business is the interstate transportation of natural gas through the State of Louisiana to destinations outside of the State; that all of the gas in Columbia Gulf's pipelines is in the continuous, uninterrupted stream of interstate commerce; that some of the gas in the stream is extracted and used solely and immediately to power compressor facilities ("compressor fuel") to enable the remainder of the commingled gas stream to continue its interstate journey; that all of the gas upon which the State has sought to impose the use tax is such compressor fuel; and that Columbia Gulf has properly paid such use tax under protest pursuant to La.R.S. 47:1576 since August, 1988, and for each month thereafter.[1]

Columbia Gulf's major Louisiana compressor stations are located approximately 85 miles apart, and all serve exactly the same purpose: increasing the pressure of the natural gas in the pipeline system to enable the gas to continue on its interstate journey to the next compressor station or point of further distribution. To accomplish this, a small amount of gas is tapped directly out of the main line, diverted into either a gas turbine or reciprocating engine, and consumed immediately as fuel to drive

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[1] No other material facts alleged by Columbia Gulf were controverted, including the purely interstate nature of Columbia Gulf's operations, the flow of gas from the point of production (typically in the federal waters offshore Louisiana) through the pipelines and compressor stations, into Mississippi, Tennessee and Kentucky.

the engines which compress the remainder of the gas stream. The only purpose for tapping into the main pipeline and removing the compressor fuel is to enable the balance of the gas stream to continue its interstate journey without interruption through and beyond the State of Louisiana.

Columbia Gulf's facilities within the State of Louisiana are regulated almost entirely at the federal level, because their business is the interstate transportation of gas. The main regulatory agencies overseeing the Columbia Gulf facilities are the FERC, the United States Department of Transportation, and the National Transportation Safety Board.

The trial court granted summary judgment in Columbia Gulf's favor without assigning written reasons. The Court of Appeal affirmed unanimously and concluded that since ". . . Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments." 637 So. 2d at 735, App. B at p. A-12. As that court explained:

> The uncontradicted evidence established that the compressor fuel does not "come to rest" in this state, nor does it form a part of the "mass of property in this state." The fuel is diverted from an interstate pipeline system and is consumed immediately as an integral part of the interstate transportation of natural gas. It is therefore beyond the scope of the use tax, and the trial court correctly granted Columbia's motion for summary judgment.

637 So. 2d at 735-36, App. B at p. A-13.

The Supreme Court of Louisiana granted a writ of review "to consider a possible conflict with *McNamara v. D.H. Holmes*,... 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988), and to

otherwise determine whether the summary judgment was legally correct".[2] It subsequently reversed the judgments of the lower courts, concluding that the compressor fuel was taxable under Louisiana's statutory scheme. The Supreme Court of Louisiana thereby found Louisiana's use tax to be coextensive with the Commerce Clause of the United States Constitution. However, even having so reasoned, the Court disregarded the uncontradicted facts established in the record — namely that the natural gas compressor fuel is in the continuous and uninterrupted flow of interstate commerce — in reaching its ultimate conclusion that the tax is constitutional.[3] In reaching that conclusion, the Louisiana Supreme Court mischaracterized this Court's decision in *Helson* as "superseded",[4] misinterpreted this Court's decision in *Complete Auto Transit*, and relied on decisions involving similar facts from the Supreme Courts of Arkansas, Mississippi and Utah, while rejecting decisions from the highest courts of Wisconsin and Tennessee.

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[2] 653 So. 2d at 523, App. A at p.A-2.

[3] Indeed, as Judge Norris (participating as Associate Justice Pro Tempore) stated in his dissent:

> The Majority ignores the record below; Columbia's Vice President of Operations, by sworn affidavit, stated that the fuel never comes to rest, but rather flows continuously without interruption from the interstate pipeline until it is consumed only seconds later in the compressor engines. Significantly, the State never contested this.

653 So. 2d at 525, App. A at p.A-6.

[4] 653 So. 2d at App. A at p. A-3.

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its use tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, a portion of a natural gas stream which is clearly being transported in interstate commerce is consumed, without ever coming to rest in Louisiana, in order to provide the energy necessary to move the remainder of the commingled natural gas stream onward in its uninterrupted interstate journey. The State of Louisiana, by executive fiat and now with the approval of its Supreme Court, has imposed its use tax directly upon the value of that portion of the natural gas stream so consumed. This Court has never authorized nor permitted the imposition of a use tax directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sales or use tax has become a part of the mass of the physical property of the taxing state.

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. The prohibition established by this Court in *Helson* has never been overruled. The majority opinion of the Supreme Court of Louisiana failed to follow this principle; indeed, that court mistakenly referred to *Helson* as having been "superseded."

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state use tax directly upon fuel consumed in the stream of interstate commerce. While the decision of the Supreme Court of Louisiana below is in accord

with recent decisions of the highest courts of Arkansas,[5] Mississippi[6] and Utah,[7] it is diametrically opposed to decisions of the highest courts of Wisconsin[8] and Tennessee[9] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts, and now that of Louisiana, totally disregarded this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the rule of *Helson* was the controlling law in this factual situation.

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Supreme Court of Louisiana, and between the highest courts of several states. These conflicts can only be resolved by this Court. The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions**. Are the decisions of the Supreme

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[5] *Pledger v. Arkla*, 309 Ark. 10, 827 S.W.2d 126, cert. den. ___ U.S. ___, 113 S. Ct. 203, 121 L. Ed. 2d 144 (1992).

[6] *Tennessee Gas Pipeline Co. v. Marx*, 594 So. 2d 615 (Miss.1992).

[7] *Questar Pipeline Co. v Utah State Tax Commission*, 817 P.2d 316 (Utah 1991).

[8] *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), cert den., 439 U.S. 997, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978).

[9] *Texas Gas Transmission Corp. v. Benson*, 444 S.W. 2d 137 (Tenn. 1969).

Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, and now Louisiana, correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? (Addressed in Section A below.)

2. **Controlling Decision.** Has the decision in *Helson*, which was subsequently cited with approval by this Court in 1973 and 1981, been superseded by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, reh. den., 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977), such that *Helson* is no longer the controlling authority on this issue? (Addressed in Section B below.)

LOUISIANA CANNOT IMPOSE ITS USE TAX DIRECTLY UPON AN ARTICLE WHICH IS CONSUMED WHILE IN THE FLOW OF INTERSTATE COMMERCE, WITHOUT EVER COMING TO REST WITHIN THE STATE OF LOUISIANA

A. Conflicts Among the Highest Courts of the Several States.

The first judicial resolution of this particular issue, i.e. the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. *Texas Gas Transmission Corp. v. Benson, supra,* note 9, involved both a factual situation and a state taxing statute essentially identical to those at issue here. In that case, the Tennessee Supreme Court stated:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor

> engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. *It is, therefore, a necessary and integral part of the interstate operation.*
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.
>
> *Moreover, we agree with the Chancellor the case of Helson v. Commonwealth of Kentucky, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), is controlling.*

444 S.W.2d 137, 139 (emphasis added).

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d 334 (Mich. App., Div. 2, 1975):

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson*, supra. The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly

> the same purpose. In either case, the tax is upon the instrument of commerce.

227 N.W.2d 334, 336.

The Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

In 1978, one year after this Court's decision in *Complete Auto Transit, Inc. v. Brady, supra*, the Supreme Court of Wisconsin reached a similar conclusion in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra* note 8. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company*. It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. This Court denied certiorari.

Thus, the decision of the Supreme Court of Louisiana in these proceedings, as well as the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, are in direct, irreconcilable conflict with the foregoing decisions of the Supreme Courts of Tennessee and Wisconsin and the appellate court of Michigan on this important federal question involving the state taxation of interstate commerce.

B. *Helson* Remains the Controlling Authority.

In deciding to follow the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, the Supreme Court of Louisiana

first opined that this Court's long-standing precedent in *Helson* had been "superseded" by *Complete Auto Transit*. Indeed, this Court has never superseded, overruled or otherwise repudiated its decision in *Helson*. Nor has this Court ever pronounced that the *only* test to be applied in Commerce Clause cases is the four-prong test of *Complete Auto Transit*. In fact, only four years after this Court's decision in *Complete Auto Transit*, the Court clearly stated in *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884, reh. den., 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981), that cases utilizing the *Helson* rationale were still applicable in certain instances. As the record clearly demonstrates, this case presents at least one of those instances.

Helson states this Court's rule on fuel used solely to power the continuous flow of interstate commerce. In *Helson*, Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the borders of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed in that state to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is a little more than repetitious to say that such a tax cannot

> be laid upon *the use of a medium by which such transportation is effected.*

279 U.S. 245, 252; 49 S. Ct. 279, 281; 73 L. Ed. 683, 687.

The undisputed facts established in this case are even stronger for the legal proposition advanced by Columbia Gulf here, than were the facts in *Helson*. Here, the compressor fuel is an indistinguishable part of the continuously moving, commingled stream of natural gas in question — the very "cargo" being transported in interstate commerce. The use tax which Louisiana seeks to impose in this case is being imposed not only on the *instrumentalities* of interstate commerce such as fuel, but directly upon the value of a part of the commodity — the compressor fuel — which itself is being transported in interstate commerce.

More recently, in *Commonwealth Edison, supra* at 12, this Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or intrastate in character. In that decision, which cited *Helson*, this Court at least tacitly indicated the continued validity of *Helson*:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237, (1922), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923), and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.
>
> * * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., *Helson & Randolph v. Kentucky*, 279 U.S. 245, 250-252, 49 S. Ct. 279, 280-81, 73 L. Ed. 683 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 562, 45 S. Ct. 184, 185, 69 L. Ed. 439 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.

453 U.S. 609, 614-15 and 617; 101 S. Ct. 2946, 2951-2953; 69 L. Ed. 2d 884, 892 and 894. But the Court made clear in a following footnote:

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided**.

(Emphasis supplied.) 453 U.S. 609, 617; 101 S. Ct. 2946, 2953; 69 L. Ed. 2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 93 S. Ct. 1186, 35 L. Ed. 2d 545 (1973), noted the continuing validity of the *Helson* rationale:

> We hold that *Edelman* [*v. Boeing Air Transport, Inc.*, 283 U.S. 249, 53 S. Ct. 591, 7 L. Ed. 1155 (1933)] and *Nashville* [*Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933)] support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.
>
> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-*

> *Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954), nor by the State in which it is merely consumed, under *Helson*. (Emphasis supplied.) 410 U.S. 623, 629-30; 93 S. Ct. 1186, 35 L. Ed. 2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

The Supreme Court of Louisiana ignored *Helson*, and treated that precedent as if it did not exist. Thus, under the decision of the Supreme Court of Louisiana, the value of the fuel for boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Louisiana, but while within the confines of interstate commerce, may be directly subjected to Louisiana's use tax, subject only to the limitations announced by this Court in *Complete Auto Transit*.

From this Court's decisions there have evolved certain restrictions (and liberties) on the states' powers to impose their taxes upon entities engaged in interstate commerce. Although this Court's decision in *Complete Auto Transit* (1977) did away with the rule announced in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951) — that no direct tax could be imposed upon interstate commerce or the privilege of doing interstate business — Columbia Gulf submits that both *Spector* and *Complete Auto Transit* addressed indirect taxes on the privilege of doing interstate business. While there has certainly been an expansion of the concept announced in *Complete Auto Transit*, and this Court has consistently held that interstate commerce may be obliged to bear its fair share of

the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of a portion of a commodity during its interstate journey, with which it is indistinguishably commingled and from which it is extracted solely for the purpose of propelling the commodity.

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit*, from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi, determined upon the gross sales or gross income derived from the activity within the State of Mississippi. The taxpayer, in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi, was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax on the **value** of the vehicles being moved in interstate commerce; rather, it was a tax based on the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test to determine the validity of a state tax affecting interstate commerce:

1 - The activity must be sufficiently connected to the state to justify the tax (the *nexus* requirement).

2 - The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 - The tax must not *discriminate* against interstate commerce.

4 - The tax must be *fairly apportioned.*

In this case, the Supreme Court of Louisiana granted a writ of review for the stated purpose of determining whether the lower courts' decisions conflict with this Court's decision in *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988). That decision does not require, or even support, the Supreme Court of Louisiana's decision in this case. Although the same Louisiana tax statutes were involved, the facts in *D.H. Holmes* are easily distinguished. In *D.H. Holmes*, the items taxed were catalogs that the parties conceded came to rest in Louisiana. Moreover, the taxpayer engaged in extensive intrastate sales through a large chain of department stores located in Louisiana, generated and supported by the catalogs. Here, there is no dispute that Columbia Gulf's activities are purely interstate and the tax has been imposed on the very fuel of interstate commerce. That same distinction is critical in this Court's most recent pronouncement on the issue, in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, ___ U.S. ___, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), which permitted Oklahoma to impose its sales tax on bus tickets sold for interstate travel, on the rationale that the sale of the tickets was a wholly local transaction.

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has never authorized the direct imposition of an unapportioned excise tax upon the value of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas*, *Texas Gas*, and *Michigan Wisconsin Pipe Line v. State*, the facts are undisputed that the natural gas which Louisiana seeks to tax in these proceedings never was removed from interstate commerce and never came to rest within the State of Louisiana before it was consumed as fuel for the interstate compressors — totally within the confines of the interstate pipeline system and in furtherance of the interstate journey.

C. Summary.

Louisiana recognizes that its taxing power does not extend to "bona fide interstate commerce". La.R.S. 47:305(E)(1). However, if the compressor fuel at issue here can be taxed, then airline fuel consumed by planes passing over the several states can be taxed by those states, diesel fuel burned by the trains and trucks passing through Louisiana or any other state and by boats moving barges on navigable streams in Louisiana or any other state can likewise be taxed.

The prohibition of state taxation established by this Court in *Helson* covers precisely the type of state tax that is imposed in this situation. This Court should address the Supreme Court of Louisiana's mischaracterization of *Helson* as "superseded" and the conflict among the several states which have accepted *Helson* or failed to recognize its continued validity.

CONCLUSION

For the foregoing reasons, Columbia Gulf submits that its Petition for a Writ of Certiorari to the Supreme Court of Louisiana should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A. Opinion of the Supreme Court of Louisiana rendered on April 10, 1995 ..... A-1

APPENDIX B. Opinion of the Louisiana Court of Appeal, First Circuit entered on May 20, 1994 ..... A-9

APPENDIX C. Judgment of Judge Bob Hester of the 19th Judicial District Court entered on April 27, 1993 ..... A-14

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APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 94-C-1650

COLUMBIA GULF TRANSMISSION COMPANY

VERSUS

ARNOLD A. BROUSSARD, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA

ON WRIT OF REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

WATSON, Justice. [1]

The primary issue is whether LSA-R.S. 47:305E(1) or the United States Constitution's Commerce Clause prohibits a Louisiana use tax on "compressor fuel". Compressor fuel is natural gas which is diverted from an interstate pipeline to power the compressors which propel the natural gas through the pipeline.

FACTS

Columbia Gulf Transmission Company, a Delaware corporation doing business in Louisiana, transports natural gas from

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[1] Judge William Norris, III, Court of Appeal, Second Circuit, participating as Associate Justice Pro Tempore, in place of Associate Justice Pike Hall, Jr.

Dennis, J., not on panel. Rule IV, §3.

offshore Louisiana to its affiliate in Kentucky through underground interstate pipelines. The gas loses pressure during the journey and is recompressed at four Louisiana compressor stations. Some of the pipeline gas is diverted to the compressor stations, where it powers the engines which boost the interstate gas pressure. The Louisiana Department of Revenue and Taxation seeks to impose a use tax on the compressor fuel which is consumed within the state.

In October of 1988, Columbia filed a petition to recover $10,717.77 in use taxes paid under protest. (Columbia agreed to escrow the use taxes for future months.) Columbia argued that a use tax on natural gas diverted from interstate gas and used solely to propel other interstate gas violates the Commerce Clause of the United States Constitution. Columbia also contended that the compressor fuel does not satisfy the requirements of R.S. 47:305E(1).

The trial court granted Columbia's motion for summary judgement, and the court of appeal affirmed. *Columbia Gulf Transmission v. Broussard,* 93 1161 (La. App. 1st Cir. 5/20/94), 637 So.2d 733. A writ was granted, 94-1650 (La. 10/7/94), 644 So.2d 626, to consider a possible conflict with *McNamara v. D.H. Holmes Co.,* 505 So.2d 102 (La. App. 4th Cir. 1987), writ denied, 506 So.2d 1227, aff'd, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988), and to otherwise determine whether the summary judgment was legally correct. *McNamara* held that Louisiana's use tax on department store catalogs mailed into the state by out-of-state printers was valid.

LSA-R.S. 47:305E intends: "to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state."

The statute clearly intends taxation of property consumed in the state. Columbia contends that the natural gas consumed as compressor fuel has not come to rest in the state and has not

become a part of the mass of property in the state. One state has held that compressor fuel does not come to rest and become a part of the state's mass of property merely because it is consumed. *Texas Gas Transmission Corp. v. Benson,* 223 Tenn. 279, 444 S.W.2d137 (1969). We disagree.

When the natural gas compressor fuel is consumed, it comes to rest and becomes a part of the state's property. Fuel must necessarily come to rest as it is consumed. If ceases to exist; it is terminated; it is used in Louisiana; it cannot be taxed in another state. Thus, the natural gas is subject to tax when it is consumed in the state under the language of the statute.

The next question is whether this use taxation is permitted by the Commerce Clause of the United States Constitution. *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929), decided that a use tax on fuel consumed by an interstate ferry boat was an unconstitutional burden on an instrumentality of interstate commerce. *Midwestern Gas v. Wisconsin Dept. of Revenue*, 84 Wis.2d 261, 267 N.W.2d 253 (1978), cert. denied 439 U.S. 997 (1978), and *Michigan Wisconsin Pipe Line v. State,* 58 Mich. App. 318, 227 N.W.2d334 (1975), two other compressor fuel cases, were decided on Commerce Clause grounds. Both followed *Helson.* However, *Helson* has been superseded by *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Under *Complete Auto Transit, Inc. v. Brady,* a state tax statute which affects interstate commerce may survive a commerce clause challenge if the tax: (1) is applied to an activity having a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the state's services.

Questar Pipeline v. Tax Com'n, 817 P.2d 316 (Utah 1991), held that gas used by a pipeline company's Utah compressor stations was subject to the state's use tax. *Questar* decided that consumption of the compressor fuel came within the state's statute and met the Commerce Clause test of *Complete Auto.* Simi-

larly, in *Pledger v. Arkla, Inc.*, 309 Ark. 10, 827 S.W.2d 126 (1992), cert. denied ___ U.S. ___, 113 S.Ct. 203, 121 L.Ed.2d 144 (1992), the Arkansas Supreme Court determined that compressor fuel consumed in the state was subject to the state sales tax. The Arkansas Court relied on *Complete Auto* and noted that the gas consumed in Arkansas would not be subject to taxation in any other state.

Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.

There is no discrimination against interstate commerce. The tax is applied equally to intrastate and interstate pipelines. Gas in interstate commerce is taxed equally with intrastate gas when both are consumed within the state.

The tax is fairly apportioned because it is imposed only on gas actually consumed in Louisiana's compressor stations. The gas is measured as it is removed and consumed. No other state can tax the same gas. The tax is fairly related to benefits provided by Louisiana. Columbia's employees enjoy Louisiana's roads, schools, fire and police protection. Columbia has the right to expropriate Louisiana private property. LSA-R.S. 19:2(5). Columbia's compressor fuel is fairly taxed because of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 33,108 S.Ct. 1619, 1624, 100 L.Ed.2d 21, 29 (1988).

Mississippi imposes a tax on the natural gas used to fuel Mississippi compressors. *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992). *Marx* held that use taxes on compressor fuel met the four prongs of the *Complete Auto* test and did not violate the Commerce Clause.

Since the use tax on compressor fuel is valid under the

Louisiana statute and the United States Constitution's Commerce Clause, a secondary issue arises and that is the Department of Revenue and Taxation's right to attorney's fees under LSA-R.S. 47:1512. The statue provides:

> The collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Sub-title. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor.

The collector employed private counsel to represent the state in the appeal of this case and a ten percent surcharge for attorney's fees may be due by tax debtor.

For the foregoing reasons, the summary judgment in favor of Columbia Gulf Transmission Company is reversed, and the case is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

LEMMON, J., concurs and assigns reasons. *
NORRIS, J. dissents and assigns reasons.

NORRIS, J., Dissenting.

I respectfully dissent. Columbia has met its burden of proving its entitlement to summary judgment under La. R.S. 47:305 E.

First, there is no genuine issue as to material fact. The majority ignores the record below; Columbia's Vice President of Operations, by sworn affidavit, stated that the fuel never comes to rest, but rather flows continuously without interruption from the interstate pipeline until it is consumed only seconds later in the compressor engines. Significantly, the State never contested this.

Columbia is also entitled to summary judgment as a matter of law. As noted by the majority, R.S. 47:305 E intends taxation of property consumed in the state. More specifically, however, the statute intends to tax the consumption of the fuel only *after* it has come to rest in this state and formed a part of the mass of property in this state. In fact, this language defines the bounds of taxation as the legislature has clearly expressed its intent *not to tax bona fide interstate commerce*. We must construe this statute in light of the law as it existed at the time of its enactment. *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 248 La. 49, 176 So.2d 425 (1965). Notably, although the legislature has periodically amended other provisions under § 305, it has never changed this language.

Though quick to reject Tennessee jurisprudence precisely on point, neither the State nor the majority has provided any legal authority for the proposition that compressor fuel under these facts comes to rest and forms a part of the mass of property in this state prior to its consumption. Moreover, in my opin-

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* As of the date of this printing, Justice Lemmon's concurrence has not yet been filed.

ion the majority misstates the holding in *Benson*. The court did not address whether the gas came to rest when it was consumed; rather the key issue was whether the fuel came to rest at any time between its separation from the mainline and its ultimate consumption in the compressor engine, and the court held it did not. The majority also omits any discussion of *Michigan Wisconsin Pipe Line Co. v. State*, 58 Mich. App. 318, 227 N.W.2d 334 (1975) and *Midwestern Gas Transmission Co. v. Department of Revenue*, 84 Wis. 2d 261, 267 N.W.2d 253 (1978), cases from two other states which have favorably cited *Benson* and rejected a tax on compressor fuel under the same facts. In both cases, the courts determined that the compressor fuel never came to rest in the state and that is consumption was a necessary and integral part of interstate commerce. See *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929). In relying on *Helson*, these courts applied the federal jurisprudence in effect at that time, imposing a *per se* ban on taxing interstate commerce; it was therefore necessary to establish whether the transaction at issue was interstate commerce, an integral part of interstate commerce or sufficiently removed from interstate commerce.

Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), has superseded *Helson* insofar as federal law now recognizes that interstate commerce may be subject to taxation in some instances; the court's decision, however, does not *require* states to tax interstate commerce to the fullest extent allowed by federal law. Many other states' sales/use tax statutes are expressly coextensive with federal law; they prohibit the tax only when it is prohibited by the constitution or laws of the United States. See *Kellogg Company v. Department of Treasury*, 204 Mich. App. 489, 516 N.W. 2d 108 (1994); *Questar Pipeline Co. v. State Tax Commission*, 817 P.2d 316 (Utah 1991); *Midwestern Gas Transmission Co. v. Department of Revenue*, supra. However, Louisiana has retained both the sales/use tax exclusion barring a tax on interstate commerce and

the language narrowly defining the transactions deemed to be outside of interstate commerce. The rational in *Helson* remains relevant to this inquiry. Moreover, the exclusion is to be construed liberally in favor of the taxpayer and against the taxing authority. *Tarver v. World Ship Supply Co.*, 615 So.2d 423 (La. App. 4th Cir.), writ denied, 616 So.2d 672 (1993), quoting Oreck, *Louisiana Sales & Use Taxtion*, § 3.1.

The exercise of the power of taxation is vested exclusively in the state legislature. *Radiofone Inc. v. City of New Orleans*, 93-0962 (La. 1/14/94), 630 So.2d 694. It is our duty to apply the law as written and give effect to the legislative intent as it exists today. The majority, with a mere wave of the hand, has effectively dismissed the "comes to rest" requirement under our law. The decision to remove the *per se* ban on taxing interstate commerce and its accompanying limitations properly lies with the legislature, not this court.

Because Columbia has shown that the compressor fuel does not come to rest and form a part of the mass of property in this state, and Louisiana law expressly excludes the taxation of interstate commerce, I would affirm the lower courts's grant of summary judgment.

APPENDIX B

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. CA 93 1161

COLUMBIA GULF TRANSMISSION COMPANY
VERSUS
ARNOLD A. BROUSSARD,
SECRETARY, LOUISIANA DEPARTMENT OF
REVENUE AND TAXATION

Judgment rendered May 20, 1994

* * * *

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 336, 283

Honorable Bob Hester, Judge

* * * *

Mr. James A. Burton Mr. J. Thomas Hamrick New Orleans, LA	Attorneys for Plaintiff-Appellee Columbia Gulf Transmission Company
Mr. Robert G. Pugh Shreveport, LA	Attorney for Defendant-Appellant Ralph Slaughter, Secretary Department of Revenue and Taxation, State of Louisiana

* * * *

BEFORE: Foil, Pitcher and Parro, JJ.

FOIL, JUDGE.

At issue in this appeal is whether Louisiana may impose a use tax on natural gas used exclusively to fuel an interstate natural gas pipeline system. The trial court ruled that the compressor fuel was not subject to the use tax. We affirm.

DISCUSSION

Columbia Gulf Transmission Company (Columbia), a Delaware corporation, filed this lawsuit against Arnold Broussard, the Secretary of the Louisiana Department of Revenue and Taxation (Department), seeking to recoup taxes paid to the State of Louisiana under protest. Columbia paid $1,667,537.23 in use taxes on natural gas used to power four compressor stations located in Louisiana. Columbia filed a motion for summary judgment on the issue of the propriety of the use tax assessment. After the presentation of evidence, the trial court entered judgment in favor of Columbia, awarding it all of the taxes paid in protest, as well as interest and costs. This appeal followed.

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966; **Louisiana National Bank v. Slaughter,** 563 So.2d 445, 447 (La. App. 1st Cir. 1990). The burden is on the mover to show that no genuine issue of material fact exists, and it is only when reasonable minds must inevitably conclude that the mover is entitled to judgment as a matter of law that summary judgment is warranted. Id. In determining whether material issues have been disposed of, any doubt is to be resolved in favor of trial on the merits. If the mover submits sufficient evidence to resolve all issues of material fact, the burden shifts to the opposing party to present evidence that a material fact is still at issue. La. Code Civ. P. art. 967;

Louisiana National Bank v. Slaughter, 563 So.2d at 447-448.

The evidence presented in support of the motion for summary judgment can be summarized as follows: Columbia transports natural gas produced in the Gulf of Mexico, offshore of Louisiana, to regions in the northern United States. After coming out of the wellhead, the natural gas flows directly into Columbia's pipeline which lies at the bottom of the Gulf. That gas, and all other gas Columbia is transporting, flows through the interstate pipeline system until it eventually reaches Kentucky, where the gas is turned over to a Columbia affiliate. Because of a resistance factor which causes the natural gas to lose pressure and slow down on its interstate journey, the natural gas is routed through various compressor stations in different states along the pipeline system, four of which are located in Louisiana. The compressor stations "re-compress" the natural gas flowing in the pipeline, in effect, boosting the pressure of the gas so that it will reach the appropriate flow rate.

The evidence established that at each compressor station, internal combustion engines or turbine engines produce the horsepower necessary to compress the gas to move it through the pipeline system. The compression units are fueled with natural gas that is taken directly from the pipeline. The natural gas is "tapped" off from the main lines, and flows through a filter system to rid it of any debris, to a regulator and measuring system, then directly to the governor of the engine that controls the speed of the engine and the horsepower from the engine. The State sought to impose a use tax on this "compressor fuel" which is burned in the turbines or engines that power the compressor stations.

It is undisputed that all of the gas at issue in this litigation is extracted directly from the interstate pipeline system and is consumed immediately to power the compressor stations in order to propel the balance of the gas stream through and beyond the State of Louisiana. This gas is now owned by Columbia, but rather is supplied to Columbia by agreement between Columbia

and the gas owners. Columbia does not store natural gas in Louisiana to operate its compressor stations.

Columbia argues that the imposition of the use tax is impermissible under the Louisiana taxing statures, as well as the Commerce Clause of the United States Constitution. Because we agree that Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments.

La. R.S. 47:302 sets forth the general rule that "there is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property..." La. R.S. 47:305 sets forth exclusions and exceptions from the tax provided for in La. R.S. 47:302. La. R.S. 47:305 E(1) states, in pertinent part:

> ...[I]t is not the intention of this Chapter to levy a tax on bona fide interstate commerce...It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

Columbia argues that the compressor fuel is excluded from the imposition of the Louisiana use tax by the express language of La. R.S.47:305 E(1). It asserts that the fuel is extracted from an interstate pipeline system and is used and consumed immediately as an integral part of a purely interstate operation, namely, the continuous, uninterrupted transportation of natural gas from the Gulf of Mexico to the northeast. This flowing compressor fuel is "bona fide interstate commerce" and does not ever "come to rest" in this state, nor does it form a "mass of property in this state".

La. R.S. 47:305 E provides for an exclusion from the use tax.

Tarver v. World Ship Supply, Inc. 615 So.2d 423 (La. App. 4th Cir.), writ denied, 616 So. 2d 672 (La. 1993). An exclusion relates to a transaction which is not taxable because it falls outside of the scope of the statute giving rise to the tax. Transactions excluded from tax are those which by the language of the statutes are defined as beyond the reach of the tax. Id. at 426 (quoting **Oreck, Louisiana Sales & Use Taxation**, §3.1) The exclusionary language makes it clear that the legislature did not intend to subject to a use tax those transactions constituting "bona fide interstate commerce." A use tax may be properly imposed when the property has been withdrawn from interstate commerce and has "come to rest" in this state or has become part of the "mass of property in this state." See **Mouton v. Klatex, Inc.**, 238 So.2d 1 (La. App. 1st Cir.), writ refused, 256 La. 873, 239 So.2d 365 (La. 1970).

The uncontradicted evidence established that the compressor fuel does not "come to rest" in this state, nor does it form a part of the "mass of property in this state." The fuel is diverted from an interstate pipeline system and is consumed immediately as an integral part of the interstate transportation of natural gas. It is therefore beyond the scope of the use tax, and the trial court correctly granted Columbia's motion for summary judgment.

CONCLUSION

Based on the foregoing, the judgment appealed from is affirmed, and consequently, the Department's request for attorney's fees is hereby denied. All costs of this appeal, in the amount of $215.97, are assessed to the Department of Revenue and Taxation.

AFFIRMED.

APPENDIX C

COLUMBIA GULF TRANSMISSION COMPANY	NO. 336, 283 DIVISION "K"
	19TH JUDICIAL DISTRICT COURT
VERSUS	
ARNOLD A. BROUSSARD, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA	PARISH OF EAST BATON ROUGE
	STATE OF LOUISIANA

JUDGMENT

This cause came on for hearing on the renewed motion for summary judgment of Columbia Gulf Transmission Company on April 2, 1993. Present were:

James A. Burton and J. Thomas Hamrick, Jr., attorneys for petitioner, Columbia Gulf Transmission Company ,

and

James C. Russell, Jr., attorney for defendant, Secretary of the Louisiana Department of Revenue and Taxation.

After hearing the evidence and the arguments of counsel, and being of the opinion that the law and the evidence favor petitioner Columbia Gulf Transmission Company, the Court hereby:

ORDERS, ADJUDGES AND DECREES that the motion for

summary judgment of Columbia Gulf Transmission Company be, and the same hereby is, GRANTED, and that judgment be entered in favor of Columbia Gulf Transmission Company and against the Secretary of the Department of Revenue and Taxation of the State of Louisiana in the sum of $1,667,537.23, representing amounts paid under protest through February, 1993, plus additional payments of Louisiana Sales and Use Tax submitted by Columbia Gulf Transmission Company for each month thereafter under protest, and which the parties have agreed and stipulate will be subject to this judgment, plus legal interest on said sums from the respective dates of payment through the date of refund as provided by law.

Judgment read and rendered in open Court in Baton Rouge, Louisiana, this 27th day of April, 1993.

[s]_____
BOB HESTER, DISTRICT JUDGE

Submitted by:

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Attorney for the Department of
Revenue and Taxation,
State of Louisiana

FILED
APRIL 27, 1993
[s]_____
LINDA AERTKER
DY. CLERK OF COURT

APPENDIX D

Louisiana Revised Statutes, Title 47
§302

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the said business.

(2) At the rate of two per centum (2%) of the monthly lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee to the owner of the tangible personal property.

C. There is hereby levied a tax upon all sales of services, as herein defined, in this State, at the rate of two per centum (2%) of the amounts paid or charged for such services.

The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

D. Notwithstanding any other provision of law to the contrary, no state sales or use tax nor any such tax levied by a political subdivision shall be levied on any advertising service rendered by an advertising business, including bot not limited to advertising agencies, design firms, and print and broadcast media, or any member, agent, or employee thereof, to any client whether or not such service also involves a transfer to the client of tangible personal property. However, a transfer of mass-produced advertising items by an advertising business which manufactures the items itself to a client for the client's use, which transfer involves the furnishing of minimal services other than manufacturing services by the advertising business shall be a taxable sale or use of tangible personal property; provided that in no event shall tax be levied on charges for creative services which are separately invoiced.

E. No exemption from the state sales and use tax granted after the effective date of this Act and granted pursuant to the provisions of this Chapter or Chapter 2-A of Title 47 of the Louisiana Revised Statutes of 1950 shall be applicable to any sales and use tax levied by any local governmental subdivision or school board unless the state exemption specifically provides that it applies to such sales and use tax levies. In the absence of any such specific

application of the state exemption to sales and use tax levies of any local governmental subdivision or school board, any state exemption granted pursuant to the provisions of this Chapter or Chapter 2-A of Title 47 of the Louisiana Revised Statutes of 1950 shall be applicable only to the levy and collection of the state sales and use tax.

F. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period August 1, 1988 through June 30, 1989, the exemptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*),, (m), (s), (G), 305.1, 305.2, 305.3, 305.8, 305.15, 305.20, 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable and of no effect.

G. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1990 through June 30, 1991, the exemptions to the two percent tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 39:468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), (G), 47:305.1, 47:305.2, 47:305.3, 47:305.8, 47:305.10, 47:305.14, 47:305.15, 47:305.20, 47:305.37, 47:305.38, 47:305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

H. Notwithstanding any other provisions to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1991 through June 30, 1992, the exemptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s),

(G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

I. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1992 through June 30, 1994, the exceptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), (G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

J. Notwithstanding any other provisions of law to the contrary, including the provisions of Subsection I of this Section as proposed by House Bill 568 of the 1992 Regular Session,[1] the provisions of R.S. 47:305(D)(1)(t) shall remain in effect for the period beginning on July 1, 1992 and ending on June 30, 1994.

K. An additional tax shall be levied as follows:

(1) At the rate of four percent of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of four percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(3) The tax levied under this Subsection shall be in addition to

the tax levied upon such sales under Subsection A of this Section and any other tax levied under other Sections of this Chapter, and shall be subject to the same definitions, exemptions, tax credits, penalties, and limitations now or hereafter prescribed in this Chapter.

(4) The tax levied under this Subsection shall be paid in lieu of any sales or use tax which would otherwise be levied and collected by a local political jurisdiction of this state.

(5) The tax levied under this Subsection shall be levied and collected only from vendors who qualify as a "dealer" in this state solely by virtue of engaging in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media, including but not limited to television shopping channels, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.

(6) The taxes levied under this Subsection shall be collected by the Department of Revenue and Taxation, advised by a sales and use tax commission consisting of seven members appointed as follows: two members appointed by the Louisiana Municipal Association; two members appointed by the Louisiana School Boards Association; two members appointed by the Police Jury Association of Louisiana; and one member appointed by the Louisiana Association of Tax Administrators. The secretary shall assess a collection fee, not to exceed one percent of the proceeds of the tax, as reimbursement for the actual cost of collection of the tax. The department shall keep the commission informed on a regular basis of the collection and distribution of the taxes collected.

(7) Pursuant to an appropriation by the legislature, the secretary shall distribute the proceeds of the tax to the central local sales and use tax collector or, if none, the parish governing authority according to population. The central local sales and use tax collector or the parish governing authority shall at no charge distribute the tax proceeds received from the secretary to each political subdivision within the parish which levies a sales and use tax or receives a portion of the proceeds of a parishwide sales and use tax levy, in accordance with each such political subdivision's pro rata share of local sales and use tax receipts collected on all other transactions subject to local sales and use taxes during the most recent state fiscal year for which data is available within thirty days of receipt of the proceeds.
Added by Acts 1994, No. 18, §1.

L. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1994 through June 30, 1996, the exceptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), and (t), and (G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.